IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0055

SCOTT P. HEDDINGS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court, Cascade County, The Honorable Kenneth R. Neill, Presiding

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TABLE OF CONTENTS

TABLE OF	AUTHORITIES	ii
STATEME	NT OF THE ISSUES	1
STATEME	NT OF THE CASE AND FACTS	1
STANDAR	D OF REVIEW	3
SUMMAR	Y OF THE ARGUMENT	3
ARGUMEN	NT	4
	RICT COURT PROPERLY DENIED HEDDINGS'D PETITION FOR POSTCONVICTION RELIEF	4
A.	The District Court's Order	4
B.	Discussion	6
CONCLUS	ION	10
CERTIFIC	ATE OF SERVICE	11
CERTIFIC	ATE OF COMPLIANCE	11
APPENDIX	ζ	12

TABLE OF AUTHORITIES

CASES

Adams v. State, 2007 MT 35, 336 Mont. 63, 153 P.3d 6019
Heddings v. Department of Corrections Mt. Sup. Ct. Cause No. 09 09-0104
Hirt v. State, 2009 MT 116, 350 Mont. 162, 206 P.3d 908
State v. Adkins, 2009 MT 71, 349 Mont. 444, 204 P.3d 19
State v. Anderson, 1998 MT 258, 291 Mont. 242, 967 P.2d 4136, 8
State v. Anderson, 2001 MT 188, 306 Mont. 243, 32 P.3d 750
State v. Frasure, 2004 MT 305, 323 Mont. 479, 100 P.3d 10139
State v. Heddings, 2008 MT 402, 347 Mont. 169, 198 P.3d 2422
State v. Maki, 2004 MT 226, 322 Mont. 420, 97 P.3d 5569
State v. Maki, 2008 MT 379, 347 Mont. 24, 196 P.3d 1281
State v. Neufeld, 2009 MT 235, 351 Mont. 389, 212 P.3d 1063
State v. Tadewaldt, 277 Mont. 261, 922 P.2d 463 (1996)8

TABLE OF AUTHORITIES (Cont.)

State v. Weatherell,	
2010 MT 37, 355 Mont. 230, 225 P.3d 1	12563
Strickland v. Washington,	
466 U.S. 668 (1984)	6, 9
United States v. Booker,	
543 U.S. 220 (2005)	8, 9
Witte v. United States,	
515 U.S. 389 (1995)	6, 8
OTHER AUT	<u>HORITIES</u>
Montana Code Annotated	
§ 46-11-504	5, 6, 9
United States Constitution	
Amend. V	7

STATEMENT OF THE ISSUES

Did the district court properly deny Heddings' amended petition for postconviction relief?

STATEMENT OF THE CASE AND FACTS

This is an appeal from the district court's denial of Scott Heddings' amended petition for postconviction relief.

In September 2005 the State filed an information in the Eighth Judicial District Court, Cascade County, charging Heddings with one count of felony incest. The charge was based on multiple incidents of Heddings sexually abusing his two stepdaughters during a period from 1994 to 2001. During the course of the investigation, Heddings made incriminating statements about his possession of child pornography, and a federal investigation was commenced. (D.C. Doc. 14.)

While the incest charge was pending in state court, Heddings was charged in federal court with receipt of child pornography, possession of child pornography, and destruction or removal of property to prevent seizure. Heddings pled guilty to the federal charges. At the federal sentencing proceeding, the federal court considered the fact that Heddings had been charged with incest in state court. The federal court imposed an enhanced sentence on the basis of the state charge, sentencing Heddings to 240 months in federal prison. (D.C. Doc. 14.)

Heddings then pled guilty in state court to the incest charge, pursuant to a plea agreement, and was sentenced to the Montana Department of Corrections for a term of 20 years, with 16 years suspended upon certain conditions, to run concurrently with his federal sentence. Heddings challenged several of the conditions of his suspended sentence in an appeal to this Court, which affirmed in part and reversed in part. State v. Heddings, 2008 MT 402, 347 Mont. 169, 198 P.3d 242. Heddings did not challenge the state court prosecution and conviction on double jeopardy grounds in the district court proceedings or on direct appeal.

Heddings subsequently petitioned this Court for a writ of habeas corpus, claiming that he was being detained illegally by the Montana Department of Corrections under a sentence that was to run concurrently with his federal prison sentence. On May 5, 2009, this Court issued an order dismissing the petition as moot, since Heddings had been paroled to federal custody on May 1, 2009.

Heddings v. Department of Corrections, Montana Supreme Court No. OP 09-0104.

On January 21, 2009, Heddings filed a pro se petition for postconviction relief in the Eighth Judicial District Court, Cascade County. (D.C. Docs. 2, 3.) On October 31, 2009, Heddings filed an amended petition for postconviction relief with a supporting memorandum, raising the present double jeopardy and ineffective assistance claims. (D.C. Docs. 5, 6.) The State filed a response to the

amended petition, and Heddings submitted a reply. (D.C. Docs. 12, 13.) On January 13, 2010, the district court issued an order denying Heddings' request for postconviction relief. (D.C. Doc. 14.) A copy of the court's order is included in the appendix to this brief. Heddings filed a pro se notice of appeal on February 5, 2010. (D.C. Doc. 15.)

STANDARD OF REVIEW

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. Hirt v. State, 2009 MT 116, ¶ 24, 350 Mont. 162, 206 P.3d 908. Claims of ineffective assistance of counsel present mixed questions of law and fact that the Court reviews de novo. Id. Double jeopardy determinations are also reviewed de novo for correctness. State v. Weatherell, 2010 MT 37, ¶ 7, 355 Mont. 230, 225 P.3d 1256; State v. Maki, 2008 MT 379, ¶ 9, 347 Mont. 24, 196 P.3d 1281.

SUMMARY OF THE ARGUMENT

The state court prosecution and the federal court prosecution were based on different transactions that occurred at different times and involved different victims. State prosecution of the incest charge was not statutorily barred by

Heddings' prior federal court conviction of receipt and possession of child pornography. Consideration of the pending state charge in determining Heddings' federal sentence did not constitute punishment for the state charge or implicate double jeopardy concerns. The failure of Heddings' counsel to move for dismissal of the state charge on double jeopardy grounds does not constitute ineffective assistance of counsel, since the motion lacked merit and would not have changed the outcome of the proceedings.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED HEDDINGS' AMENDED PETITION FOR POSTCONVICTION RELIEF.

Heddings challenges the district court's denial of his request for postconviction relief on double jeopardy and ineffective assistance grounds. The district court's conclusions with respect to these claims are legally correct and factually supported, however, and this Court should find no error.

A. The District Court's Order

The district court noted that Heddings raised two claims in his amended petition for postconviction relief. First, Heddings claimed that he was subjected to double jeopardy because he was sentenced in state court for conduct that was used to enhance his federal sentence. Second, Heddings claimed that his trial counsel

was ineffective because he failed to seek dismissal of the state court charge on double jeopardy grounds. The court found no merit in either claim.

Addressing first the double jeopardy claim, the district court focused on Heddings' statute-based argument under Mont. Code Ann. § 46-11-504 and this Court's recent decision in <u>State v. Neufeld</u>, 2009 MT 235, 351 Mont. 389, 212 P.3d 1063. After summarizing the <u>Neufeld</u> decision, the court determined that Neufeld did not require granting postconviction relief in Heddings' case.

The court found that the facts of Heddings' case are distinguishable from the facts of Neufeld. In Neufeld, the state and federal prosecutions were based on the same sexual conduct with the same victim. In Heddings' case, however, the state and federal prosecutions were based on different criminal acts committed during separate transactions. Heddings was charged with incest in state court and receipt and possession of child pornography in federal court, with each charge based upon separate conduct.

The court also noted that Heddings was relying upon language from Justice Rice's concurring opinion in <u>Neufeld</u> that is not part of the majority opinion. In particular, the court found that Heddings cited ¶ 24 of the concurring opinion in support of his argument that the federal court's enhancement of his sentence triggered the double jeopardy protections of § 46-11-504.

The court observed that both this Court and the United States Supreme Court have rejected the argument that sentence enhancement for conduct that is later the basis for another conviction constitutes double jeopardy. The court looked to Witte v. United States, 515 U.S. 389 (1995), and State v. Anderson, 1998 MT 258, 291 Mont. 242, 967 P.2d 413, as support for rejecting Heddings' double jeopardy claim.

With respect to Heddings' ineffective assistance of counsel (IAC) claim, the district court applied the appropriate standard set forth in Strickland v.

Washington, 466 U.S. 668 (1984), which requires a two-prong analysis of defense counsel's performance and the prejudice, if any, that resulted from any deficiencies in that performance. The court determined that the failure of Heddings' state court counsel to raise a double jeopardy argument and seek dismissal of the state charge was not deficient, inasmuch as the double jeopardy claim had no legal merit. The court also determined that Heddings could show no prejudice from his counsel's failure to pursue dismissal on double jeopardy grounds, since the court would have been obligated to deny the motion to dismiss. The court concluded that Heddings' IAC claim meets neither the first nor the second prong of the Strickland test.

B. Discussion

Heddings' double jeopardy claim is primarily based upon Mont. Code Ann. § 46-11-504, which provides in pertinent part that "[w]hen conduct constitutes an

offense within the jurisdiction of any state or federal court, a prosecution in any jurisdiction is a bar to a subsequent prosecution in this state if: (1) the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction." Although Heddings' brief also refers to the Fifth Amendment's double jeopardy clause, his argument focuses on the state statute as applied by this Court in Neufeld.

Heddings does not challenge any of the district court's factual findings underlying his claim. In particular, he does not contest the court's finding that the state and federal prosecutions involved different victims and different offenses that did not arise out of the same transaction. Nothing in the record would support a contrary finding. Heddings was charged in state court with incest, a charge based upon his sexual abuse of his stepdaughters over several years, ending in 2001. Heddings was charged in federal court with receipt and possession of child pornography in 2005. There is no suggestion in the record that the child pornography was in any way connected to the earlier incest charge involving the stepdaughters.

The district court correctly distinguished <u>Neufeld</u> on the basis of the differences between the federal and state charges. In <u>Neufeld</u>, this Court determined that the State of Montana sought to punish the defendant for the same sexual contact that had been previously punished in federal court. While the

charges were not identical, this Court found that they were equivalent for purposes of the statutory double jeopardy test under <u>State v. Tadewaldt</u>, 277 Mont. 261, 922 P.2d 463 (1996). In contrast, Heddings was charged in state court with different conduct that occurred at different times and involved different victims. None of that conduct formed the basis for the charges in federal court.

Although the federal court considered the pending state court incest charge, together with Heddings' admissions concerning the incest charge, at the time of sentencing Heddings on the federal charges, the federal sentence cannot be considered punishment for the state court charges. The district court correctly recognized that under this Court's decision in <u>Anderson</u>, which relied in part upon the Supreme Court's decision in <u>Witte</u>, a sentencing court's consideration of other pending charges does not implicate double jeopardy concerns.

While Heddings attempts to distinguish <u>Anderson</u> and <u>Witte</u>, those decisions provide useful guidelines for the resolution of Heddings' double jeopardy claim.

Contrary to Heddings' suggestion, <u>Neufeld</u> did not overrule, expressly or implicitly, the Court's decision in <u>Anderson</u>, which has withstood subsequent challenges and remains the law in Montana. <u>State v. Anderson</u>, 2001 MT 188, 306 Mont. 243, 32 P.3d 750. <u>Witte</u> remains as the Supreme Court's view on the double jeopardy issue, particularly in light of <u>United States v. Booker</u>, 543 U.S. 220 (2005), in which the Supreme Court determined that the federal Sentencing

Guidelines are advisory only. Under <u>Booker</u>, the federal sentencing scheme resembles Montana's discretionary sentencing scheme, and a federal enhancement based on state charges cannot be considered an equivalent offense or separate punishment for double jeopardy purposes under § 46-11-504.

Heddings also disputes the district court's decision on his IAC claim, arguing that the district court misapplied Strickland's test by requiring him to show that a motion to dismiss on double jeopardy grounds would have been granted. However, the district court's resolution of the IAC claim is consistent with this Court's resolution of similar IAC claims involving defense counsel's failure to file various motions. In State v. Adkins, 2009 MT 71, ¶ 25, 349 Mont. 444, 204 P.3d 1, for example, the Court observed that where a defendant's IAC claim is based on his counsel's failure to file a motion, he must establish that there was some arguable merit to the motion. As the Court noted in State v. Frasure, 2004 MT 305, ¶ 12, 323 Mont. 479, 100 P.3d 1013, counsel are not expected to make motions that theoretically might help their clients, if the motions lack merit. Adams v. State, 2007 MT 35, ¶ 37, 336 Mont. 63, 153 P.3d 601; State v. Maki, 2004 MT 226, 322 Mont. 420, 97 P.3d 556.

The district court correctly applied the <u>Strickland</u> test in determining that Hedding's trial counsel did not render ineffective assistance of counsel. Counsel's failure to move for dismissal on double jeopardy grounds was not a deficient

performance, since the district court would have been obligated to deny the motion under the rationale of <u>Anderson</u>. In addition, Heddings could not demonstrate a reasonable probability that the result of the proceeding would have been different if counsel had filed such a motion. The court found no merit to the IAC claim and

properly denied postconviction relief. The court's conclusion is correct and should

be affirmed.

CONCLUSION

The district court's order denying Heddings' amended petition for postconviction relief should be affirmed.

Respectfully submitted this 3rd day of May, 2010.

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By: ______
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10

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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DATED			

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JOHN PAULSON	

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APPENDIX

Order Re: Petition for Postconviction Relief......Appendix